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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1035~~

GAS LIGHT COMPANY OF COLUMBUS,

Petitioner,

against

GEORGIA POWER COMPANY AND THE SOUTHERN COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1970

No. 1835

Gas Light Company of Columbus,
Petitioner,

against

Georgia Power Company and The Southern Company,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, Georgia Power Company ("Georgia Power") and The Southern Company ("Southern"), file this brief in opposition to the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on March 23, 1971 and respectfully urge that such Petition be denied in all respects.

Question Presented

The sole question presented by the Petition is whether the courts below, that is, the United States District Court for the Middle District of Georgia, and the United States Court of Appeals for the Fifth Circuit, correctly applied this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), in holding that electric utility rate schedules, established by order of the Georgia Public Service Commission,

after full and fair adversary hearings, in which Petitioner participated, may not give rise to a private action under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Sections 3 and 4 of the Clayton Act (15 U.S.C. §§ 14 and 15).

Counterstatement of the Case

A. *The Proceedings Below.*

This proceeding arises out of a private antitrust suit filed by Petitioner against Georgia Power and Southern in the District Court for the Middle District of Georgia *to enjoin the enforcement* of four retail electric rate schedules ordered effective by the Georgia Public Service Commission, and to recover treble damages (R 9).[1]

By order and opinion dated May 14, 1970 (R-227-56; 313 F. Supp. 860; Petition, Appendix A) Judge Elliott of the District Court granted summary judgment to defendants with respect to all but a small portion of the complaint, which is unrelated to the rate schedules involved here, and still remains for further determination in the District Court (R 231, 235-6). The motion for summary judgment was based upon a full and complete stipulation of facts entered into by the parties for the purpose of enabling the court to pass upon the motion (R 29-78). The stipulation was supplemented by both parties at the request of the District Court and the issues were fully briefed (R 147-227, 80-147).

The Petitioner appealed to the United States Court of Appeals for the Fifth Circuit (R 259-61). Briefs were filed by Petitioner and by Respondents, and Petitioner filed a reply brief. In addition, the Court of Appeals granted

(1) References to "R—" are to the Appendix in the Court below. The number following the "R" refers to the page of the Appendix.

leave to Atlanta Gas Light Company, another local Georgia gas utility, to file a brief, *Amicus Curiae,* and Respondents filed an answering brief. Thus, the question presented by this proceeding was fully briefed in both courts below.

Based on this full and stipulated record, the District Court's opinion, and upon the five separate briefs filed with it, the Court of Appeals, on March 23, 1971, unanimously affirmed the order of the District Court, granting summary judgment to Respondents (440 F.2d 1135; Petition, Appendix B).

B. *The Parties To This Proceeding.*

Petitioner ("Gas Light") is a privately owned gas utility regulated as a public service corporation by the State of Georgia through the Georgia Public Service Commission ("Commission"). Respondent Georgia Power is a privately owned electric utility also regulated as a public service corporation by the Commission. Respondent Southern, a utility holding company regulated by the United States Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79 *et seq.;* see S.E.C. File No. 37-59), owns all of the stock of Georgia Power. Southern, as distinguished from its subsidiaries such as Georgia Power, does not engage in the sale of electric energy in Georgia or elsewhere (R 81, 227).

The respective service areas of Petitioner and Georgia Power overlap at Columbus, Georgia, and its environs, so that, in Columbus, and in part of the area around it, Gas Light and Georgia Power compete with each other in the sale of energy (R 227).

C. *The Four Local Retail Electric Rate Schedules which are the Subject of this Proceeding.*

The Petition, and the appeal below, relates solely to four of Georgia Power's local retail electric rate schedules. These are Georgia Power's "B-10-B Rate;" its "Underground Residential Distribution Wiring Plan;" its "Residential Wiring Plan, Rule G;" and its "TE-2 Budget Billing Rate." (R 33-4, 228-31):

It is undisputed that each of these four rate schedules became effective by order of the Commission. Thus, the "B-10-B Rate" had been in effect since 1933, with subsequent amendments, pursuant to the orders of the Commission. The "TE-2 Budget Billing Rate" has been in effect since January 1, 1965 pursuant to Commission order. The "Residential Wiring Plan, Rule G" became effective on January 1, 1960 pursuant to Commission order and was extended for ten years by order of the Commission dated December 19, 1962; and the "Underground Residential Distribution Wiring Plan" has been the subject of two Commission orders dated June 28, 1968 and November 18, 1968[2] (R 34-38, 232-5).

These four rate schedules were described by the Court of Appeals below as follows:

> "Rate Schedule B-10-B
>
> This is a general service rate in effect since 1933 with subsequent amendments. The charge reduces as the load increases. • • •

(2) This last order has been appealed to Georgia's courts by Atlanta Gas Light Company, which like Petitioner was a party to the proceeding before the Commission (R 37). The procedure followed by Atlanta Gas Light Company, that of appealing the Commission's order to the state courts, is the proper method to obtain judicial review of the Commission's orders. Petitioner here, seeking the same end, judicial review of the Commission's orders, has attempted to secure such review from a federal court by utilizing an improper private antitrust suit.

"Rate Schedule TE-2

This is a budget billing plan for homeowners whose primary source of energy is electricity and whereunder the annual electric bill is estimated and divided into twelve equal installments with an adjustment at the end of the year based on actual usage. • • •

"Underground Residential Distribution Wiring Plan

This rate came about in 1967 by reason of the Federal Housing Authority requiring underground wiring in new subdivisions. • • •

"Residential Wiring Plan, Rule G

• • • This schedule was implemented in 1961 pursuant to an order of the Commission but was revised by the Commission in 1962 after hearing. Under it Georgia Power makes a promotional payment of $50.00 to $180.00 per unit if residences or apartments are wired for electric range and electric water heater, dryer or space heating." (440 F.2d at 1137)

Each of these four rate schedules has been the subject of very hotly contested hearing before the Commission, and each of them is the product of an order of the Commission resulting from such hearings.

Thus, in a recent proceeding (Docket 2027-U) in which Petitioner was an active party, the Commission reviewed Georgia Power's "B-10-B" and "TE-2" rates and issued its own order establishing the rate schedules as to which Gas Light complains herein (R 197-209; Petition, Appendix B, pp. xxviii-xxix).

The "Residential Wiring Plan", originally ordered effective by the Commission in 1960 (*Re Georgia Power Company*, 40 P.U.R. 3d 302 (1961)), was established in its present form by an order in 1962 extending the plan for 10 years. This plan was also attacked in the recent hearing to

which Petitioner was a party and in which it actively participated (*See* Commission Docket 2027-U; R 37-8, 197-209).

Finally, Georgia Power's "Underground Residential Distribution Wiring Plan" was the subject of extensive hearings in which Petitioner was an active litigating party before the Commission commencing in 1967, which culminated in the orders of June 28, 1968 and November 18, 1968[3] (R 36-37).

THE OPINIONS BELOW

The courts below reviewed very carefully the various orders concerning Georgia Power's rate schedules which the Commission issued and in particular the Commission's action in Docket 2027-U up to the very date of oral argument in the District Court (Petition, Appendices A and B).

The District Court noted that after many days of hearings, the Commission issued its order, dated November 25, 1969, in which it held that the "TE-2" rate was "just, fair and equitable," and ordered that the rate "be retained in [its] present form." In this order the Commission also mandated that the "Residential Wiring Plan" should remain in effect until January 1, 1973 at which time it would be terminated by its terms. Finally, the Commission's order instructed Georgia Power to submit revisions to its "B-10-B" schedule consistent with certain specifications set forth in the Commission's order (R 236-7).

The District Court concluded that each of the rate schedules complained of by Gas Light was the product of Com-

(3) The Commission twice held:

"Wherefore, it is ORDERED: That the plans submitted on November 14, 1967 by Georgia Power Company be and the same is hereby disallowed" (Stipulation Exhibits C and D, R 55, 62).

The Commission then set forth the specifications by means of which Underground Residential Distribution would have to be provided by Georgia Power. It is those specifications which Petitioner here seeks to attack (Petition, pp. 10-11).

mission action, and not the product of private voluntary action by Georgia Power and Southern. And the District Court noted specifically that the Commission in each of its current orders dealing with these four schedules expressly retained jurisdiction over them "for the purpose of entering any further order or orders as this Commission may deem mete and proper" (R 237).

The Court of Appeals below, in unanimously affirming the District Court's opinion and order, held that:

> *"As we have seen above, the Commission here gave lengthy consideration to each of the practices and rates under attack, and after full adversary hearings ordered them into effect, some with major modifications.* Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. *Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission.*
>
> • • • • •
>
> "Our view is that the *Parker* exclusion applies to *the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority; here the Georgia Public Service Commission."* (440 F.2d at 1140) (Emphasis added).

We must take issue with Petitioner's description of the decision below. The Petition describes the ruling below as follows:

> "The Court of Appeals ruled—in effect—that merely because the dispute concerning respondents' rates and business practices were aired before the

> Georgia Public Service Commission, and merely because the Commission approved (or, really, failed to disapprove) those practices, that the activities of Georgia Power here challenged are *immune* from antitrust sanctions" (Petition, p. 33).

However, the language used by the Court of Appeals as quoted above, without more, makes clear the fatal flaws in Petitioner's characterization.

Thus, the court below did not hold that Georgia Power was granted antitrust "immunities" merely because the Commission heard a dispute over its rates. This suggestion surely misrepresents the tightly reasoned opinion of the court below. That court held, quite correctly, that rates, such as those involved herein, which are the product of the Commission's "considered judgment" as evidenced by the "major modifications" imposed and written by the Commission itself, cannot be said to be voluntary private action; but rather constitute "state action" under *Parker* to which Congress never intended the Sherman and Clayton Acts to apply.

Point I

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner claims (Petition, p. 11) that five decisions (including the case at bar) of four Courts of Appeals are in irreconcilable conflict over the antitrust immunity granted to state action by *Parker* v. *Brown*.[4] A review of those deci-

(4) *G. R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), *cert. den.*, 400 U. S. 850 (October 12, 1970); *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 438 F. 2d 1286 (5th Cir. January 5, 1971), petition for certiorari filed May 15, 1971 (No. 1712); *Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, 438 F. 2d 248 (4th Cir. February 12, 1971); *Hecht* v. *Pro-Football, Inc.*, 1971 CCH Trade Reg. Rep. ¶ 73, 559, p. 90, 327 (D. C. Cir. April 27, 1971); and the decision below.

sions, however, establishes that they are consistent with each other, and with *Parker*. There is no conflict.

In the *Parker* case, this Court held that Congress did not intend that the antitrust laws should "restrain state action or official action directed by a state" (317 U. S. at 351).

Two of the Court of Appeals decisions cited by Petitioner as declining to apply the *Parker* rule were cases where the state action had been *improperly* induced. Thus, in *Whitten,* the First Circuit held that *Parker* did not apply to a state procurement agency's standards which could be met only by a single supplier, where those standards were established by reason of a conspiracy between that supplier and employees of the state procurement agency. Again, in *Woods,* the Fifth Circuit held that *Parker* did not apply to an order of a state agency where that order was based upon fraud and false statements filed by the defendant The ruling of these two cases is simply and logically that one who defrauds or misleads state agencies, or induces state officers to breach their public duties, cannot claim antitrust immunity for the state action which they themselves improperly induced.

In contrast to *Whitten* and *Woods,* there has never been the slightest suggestion of impropriety on the part of any state officer or employee in this case nor any suggestion that Georgia Power has ever acted improperly in its dealing with the Commission.

The decision of the District of Columbia Circuit in *Hecht,* cited by Petitioner as one of the cases involved in "irreconcilable" *Parker* conflict, did not even involve the *Parker* doctrine. The case concerned the interpretation of two federal statutes. The sole question in that case was whether enabling legislation enacted by Congress authorizing the District of Columbia Commissioners to construct and enter into contracts with respect to a sports stadium superseded the Sherman and Clayton Acts and permitted exclusive dealing contracts with professional football teams. The Court

of Appeals for the District of Columbia held that in approving this minor enabling legislation, which dealt merely with the construction of a sports stadium, Congress did not intend, by implication, to eliminate the applicability of the basic and important provisions of the Sherman Act. It is evident, therefore, that "state action" in the *Parker* sense was simply not involved.

None of the foregoing three cases is in conflict with either the Fourth Circuit decision in the *Washington Gas Light ("VEPCO")* case or with the case at bar. In neither of the latter cases is there any issue of collusion with state officials or of fraud practiced by private parties on state officials. Nor is there any contention here, as in *Hecht,* that limited purpose *federal* legislation should be stretched to abrogate the *federal* antitrust laws, contrary to the legislative intent. Both the *VEPCO* case and the case at bar involve state agencies regulating local public utilities under broad grants of authority by the state legislatures. Such legislation authorizes the utilization of private monopolies in furnishing, for example, electric and gas services and provides for comprehensive regulation of those monopolies by Public Service Commissions.

In the *VEPCO* case an important issue was whether the Virginia Commission had actually "approved" the rate schedules filed with it. There were no hearings before that Commission and the "approval", as the Fourth Circuit Court of Appeals held, was inferred from the fact that the Commission had an opportunity to reject the rate schedules and did not do so (438 F.2d at 252).

No such issue exists in the case at bar. The Georgia Commission held hearings, heard the adversaries, and affirmatively approved the rate schedules after directing modifications. This case does not deal with schedules as to which the state agency was silent.[5] The Court of Appeals

(5) The *VEPCO* decision will not be brought before this Court because the parties have settled their controversy and accordingly certiorari will not be sought (Public Utilities Fortnightly, Vol. 87, No. 13, June 24, 1971, p. 61).

below did not infer state approval from any equivocal act, and the Court of Appeals expressly noted this difference between the *VEPCO* case and the case at bar:

> "[I]t is not necessary for us to extend the *Parker* exclusion to the point of its extension in *Washington Gas Light and we do not do so.*" (440 F.2d at 1140) (Emphasis added).

This clear language and holding of the Court below belies Petitioner's unworthy characterization of the opinion below as, "relying heavily on the recent Fourth Circuit decision, *Washington Gas Light Co.* v. *Virginia Electricity & Power Co., supra*" (Petition, p. 23).

The case before this Court involves retail electric rate schedules which were the subject of major antitrust attack by Petitioner and others before the Georgia Public Service Commission, and which were the subject of lengthy adversary proceedings. The schedules involved in this case were not merely "approved" by the Commission. Indeed substantial provisions of Georgia Power's proposals were *rejected* and then rewritten by the Commission.

Point II

THE COURTS BELOW PROPERLY APPLIED THE RULE OF *PARKER v. BROWN.*

Petitioner argues in support of its Petition that the Courts below improperly applied the doctrine enunciated by this Court in *Parker* v. *Brown.* We submit that the Courts below were both correct in applying the *Parker* doctrine and that their decisions are in full accord with the decisions of this Court and of the United States Courts of Appeals which have passed upon this doctrine.

Petitioner appears to misunderstand the holding of *Parker* v. *Brown.* This landmark case which even Peti-

tioner now agrees should not be overruled,[6] held in no uncertain terms that:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. • • •
>
> " • • • It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. • • •
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake the prohibit." (317 U. S. at 351, 352)

Thus, the rule of *Parker* is that Congress did not intend the antitrust laws to weaken or destroy regulatory policies or machinery established by the states. The wisdom of *Parker* is evidenced by the fact that in the nearly 30 years of its effectiveness, it has been reaffirmed at least twice by this Court, and has not been challenged by Congress (See *Noerr* and *Pennington*, footnote 6, below).

Moreover, the recent decisions of the United States Court of Appeals, two of which Petitioner chooses to ignore, have applied *Parker* in a sensible and wholly consistent manner.

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(6) At oral argument in the District Court Petitioner took the astonishing position that *Parker* v. *Brown* was no longer good law, until confronted with *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965). In its brief before the Court of Appeals Petitioner conceded grudgingly that *Parker* v. *Brown* still has some limited vitality.

Thus, in *Allstate Insurance Co.* v. *Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965), aff'd 361 F. 2d 870 (4th Cir. 1966), *cert. den.* 385 U. S. 930 (1966), a case in many ways similar to the case at bar, the plaintiff, a regulated insurance company, claimed that the creation, under North Carolina law, of a rate-fixing insurance bureau whose activities were closely regulated by state officials, constituted a violation of the Sherman Act. The Fourth Circuit Court of Appeals, affirming the conclusions of the District Court, held that:

> "The District Court's finding in the present case that the North Carolina Rating Bureau was operated under the active supervision of the State is not challenged in this Court, and we find no merit in the distinction suggested by appellants between the injunction sought in *Parker* v. *Brown* and the declaration of pre-emption sought here. The central question in both cases is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker* v. *Brown*, the North Carolina Statutory Plan is clearly valid." (361 F. 2d at 872)

And, in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52 (1st Cir. 1966), *cert. den.* 385 U. S. 947 (1966), a case which Petitioner chooses to ignore in his discussion of a "conflict in the Circuits", the First Circuit held, in the face of a Sherman Act conspiracy claim by plaintiff, who was a rejected franchisee, that the franchise granted by the Massachusetts Port Authority, a legislatively created agency of the state, to plaintiff's competitor at Logan Airport, was beyond the reach of the Sherman Act under *Parker* v. *Brown* even though the granting of the franchise effectively put plaintiff out of business:

> "What was done here was done in the exercise of a valid governmental function. *The antitrust laws are aimed at private action, not at governmental action.*" (362 F. 2d at 55) (Emphasis added)

In *Sun Valley Disposal Co., Inc.* v. *Silver State Disposal Co.* 420 F. 2d 341 (9th Cir. 1969), another case ignored by Petitioner, the Ninth Circuit Court of Appeals held that the granting of an exclusive contract to the defendant by the County Commissioners, pursuant to the provisions of a state law, could not support a claim that this contract constituted a violation of the Sherman Act. The Court of Appeals affirmed the summary judgment granted by the District Court on the basis of the *Parker* doctrine.[7]

In the District Court below, Petitioner suggested that the *Parker doctrine,* if it had any vitality at all, protected only officers or direct agents of the state, but not "private parties" who are compelled by State law to carry them out. Obviously, this position was wholly untenable. See *Noerr* and *Pennington,* footnote 6, *supra,* where this Court applied *Parker* v. *Brown* to private parties.

Although Petitioner abandoned this argument in the Court of Appeals, it repeats here, as it did below, the argument that under Parker, the antitrust laws are *inapplicable only* to those "limited instances and . . . rare and extreme circumstances" where "a state legislature may make a deliberate and conscious decision directing private business entities to engage in anti-competitive conduct which would contravene the principles of free and open competition demanded by federal antitrust laws." (Petition, p. 16) Petitioner argues, however, that the antitrust laws are *fully applicable to those very same acts* when commanded by a state regulatory agency pursuant to a grant of general regulatory authority, by the same state legislature. Respondents submit that this argument is, on its face, wholly untenable.

To accept Petitioner's narrow and distorted "interpretation" of the rule of *Parker* v. *Brown* would drain it of any

(7) This decision has recently been reaffirmed by the Ninth Circuit in *John Kalin Funeral Home Inc.,* v. *Fultz* (1971 CCH Trade Cases § 73,596, p. 90, 465) (May 28, 1971).

viable function or meaning. The reason is obvious. Governments simply do not operate in that fashion. When legislatures desire to regulate an industry, and take it out of the rules of the open market, they create agencies and empower them to regulate the industry, fix rates and review the business practices of the industry. Legislatures never themselves establish the precise rules, regulations and rates to be followed by the regulated industries.

Acceptance of Petitioner's position in this litigation would deprive the states of the power to regulate those businesses in the usual way that they do so[8]—by an agency under a general enabling statute which provides only general directions. Certainly, Congress in enacting the Sherman and Clayton Acts, and this Court in *Parker,* never intended to prevent the states from regulating industries by use of the very same procedures used by the Congress itself.

Indeed the power of a state, to regulate by legislation, those businesses "affected with a public interest" has not been open to question for decades. And it matters not that one of the methods of regulation adopted is the fixing of prices to avoid "destructive and demoralizing competitive conditions," even with respect to a business that is not commonly considered to be a "public utility." *Munn* v. *Illinois,* 94 U. S. 113 (1876); *Nebbia* v. *New York,* 291 U. S. 502 (1934); *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251 (1936). The power of a state to so regulate a public utility has been generally conceded. See *Nebbia, supra,* 291 U. S. at 531, 532.

Nor does it matter that the act required to be performed under the regulatory system adopted by the state would

(8) All fifty states have created agencies to regulate the furnishing of utility services to ultimate consumers. Federal Power Commission Report entitled *"Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities 1967",* U.S.G.P.O. No. F.P.C. S-184.

conflict with the antitrust laws if performed privately and voluntarily. In *Parker,* this Court stated:

> "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate.
>
> • • • • •
>
> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (317 U. S at 350, 351)

Finally, Petitioner's continued assertion that the rates of which it complains are private and voluntary is wrong, both factually and as a matter of law. This becomes especially clear, in light of *Parker,* when it is realized that if Georgia Power attempted to deviate, in any way, from those rates, it would be exposed to severe criminal and civil penalties (Georgia Code §§ 93-416, 417, 9901). In *Parker,* this Court said:

> "Here the state command to the Commission and to the program committee of the California Prorate

> Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. *Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions." (317 U. S. at 352) (Emphasis added)

Thus, the hallmark of "voluntary action" in terms of *Parker, i.e.*, that the action may be altered freely without penalty, is absent in this case. On the other hand, the hallmark of "state action", in terms of *Parker, i.e.*, that any deviation from the required act may subject Georgia Power to state sanctions, is clearly present. Based upon even this, the simplest of tests, there can be no doubt this case involves action mandated by the state.

Accordingly, the conclusion is inescapable that the courts below applied *Parker* quite correctly in holding that the orders of the Commission constitute state action and thus are beyond the reach of the antitrust laws.

Point III

THE CONCEPT OF PRIMARY JURISDICTION IS TOTALLY IRRELEVANT TO THE INSTANT ACTION.

Petitioner's Point III represents a new contention never raised before in this litigation. It therefore cannot be raised at this time. Supreme Court Rule 40(1)(d)(2); See, *Neely* v. *Eby Construction Co.*, 386 U. S. 317, 330 (1967). Moreover it clearly is without merit. Petitioner's claim is that the Court below misapplied the concept of "primary jurisdiction" and substituted "administrative regulation" for "anti-trust protection" (Petition, p. 33). Petitioner then chastises the Court below for ignoring the series of cases which deal with the proper role of the antitrust laws in the deliberations of specialized *federal* agencies.[10]

One can hardly find a group of cases more irrelevant to the issue of *Parker* v. *Brown* than these federal administrative agency cases. In these cases, this Court was balancing the competing interests of two sets of federal statutes, and the policies underlying them. The question before the Court in each case was whether Congress intended the agency involved to suspend or ignore the antitrust laws, or intended that the regulated industry be immunized from antitrust sanctions. We have no such question here. This Court decided almost thirty years ago in *Parker* that Congress did not intend the antitrust laws to apply to the acts and activities mandated by the *states*. In so doing, a major federal-state constitutional conflict was avoided. The application of the antitrust laws to the states, as proposed

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(10) *Carnation* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966); *U. S.* v. *Radio Corp. of America*, 358 U. S. 334 (1959); *U. S.* v. *Pan American World Airways*, 371 U. S. 296 (1963); *California* v. *F.P.C.*, 369 U. S. 482 (1962); *U. S.* v. *Philadelphia National Bank*, 374 U. S. 321 (1963); and *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963).

by Petitioner, despite its somewhat disingenuous disclaimer of any such intent, would simply lead directly into that conflict and would ultimately result in denying to the states the ability to regulate, in any substantial sense, the industries and businesses of their citizens which the states conclude are "affected with a public interest."

Although Petitioner claims that the rule it offers would have no effect on the power of the states to regulate utilities or establish their rates, the simplest analysis of its position reveals that the reverse would be true. In this action Petitioner has sought to *enjoin* Georgia Power from carrying out a rate schedule mandated by the State of Georgia. Obviously, the issuance of any such injunction would compel Georgia Power's management to choose between disobeying a federal injunction and subjecting itself to Georgia's civil and criminal penalties. Unless Petitioner really intends the federal injunction it seeks to be ineffective, the necessary result is the destruction of the valid orders of the Public Service Commission by the federal court.

Therefore, Petitioner's assertion (Petition, p. 32) that it does not seek "to have the federal antitrust laws vitiate important local policies the achievement of which require that states expressly prohibit or suspend some principles of open competition" can hardly be accepted as a basis for action by this Court.

Conclusion

Despite its assertion of seeking only modest relief, Petitioner seeks nothing less than to destroy the power of the states to regulate local utilities and to establish local utility rates. Petitioner seeks this result not by direct action against or within the state but rather indirectly by an improper private antitrust action against those who follow the command of the state. In *Parker* v. *Brown* this Court held that Congress did not intend so to shackle the states by authorizing private antitrust actions against those who carry out state policies. Unless this Court is prepared to overrule *Parker* v. *Brown,* which neither Congress nor this Court has seen fit to do in nearly thirty years, the Petition must be rejected.

For this reason, and because Petitioner has failed utterly to show that there is any split in the circuits with respect to the application of the *Parker* doctrine, or that any other compelling reason exists for granting Certiorari in this case, the Petition for a Writ of Certiorari should be, in all respects, denied.

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Respectfully submitted,

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